No. 90-1102 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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February 1991

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

CONSTITUTIONAL PROVISIONS

RULES

ARGUMENT

I. THE BAR'S SUGGESTION THAT THE QUESTIONS PRESENTED ARE NOT RIPE IS DISHONEST, BECAUSE THE PROCEEDINGS IN THE FLORIDA SUPREME COURT WILL AFFECT NONE OF THOSE ISSUES

In the Brief in Opposition ("Opp.") at 9-10, respondent Florida Bar ("the Bar") argues that the "principle" of abstention applies here, because, it says, the questions of federal constitutional law presented by this case are not ripe for consideration by this Court. The Bar explicitly represents that, in one pending proceeding, *Florida Bar Re David P. Frankel*, No. 76-853 (Fla. filed Oct. 29, 1990), the Florida Supreme Court may determine "under state law" that "the Bar has no authority to engage in activities beyond" those which as a matter of federal constitutional law under *Keller v. State Bar*, 110 S. Ct. 2228 (1990), it can compel objecting members to subsidize. Opp. at 3, 10. The Bar also implicitly represents that, in another pending proceeding, *Florida Bar Re Petition to Amend Rules Regulating the Florida Bar - Bylaws 2-3.10 and 2-9.3* (Fla. filed Jan. 3, 1991), the Florida Supreme Court may make "further amendment of its member dissent procedures" that would moot the questions presented here. Opp. at 9-10. *Both representations are false.*

The Bar's petition and proposal for amending its rules are reproduced as Appendix A hereto. Approval of the amended rules in their entirety would moot *none* of the questions presented here concerning the constitutionality of the Bar's rules, *i.e.*, whether pre-collection reduction and pre-collection notice are necessary, and whether multiple, specific objections can be required of dissenting members. The Bar's rules would still provide *neither* pre-collection reductions in the dues of nonmembers who object to the use of their compulsory bar dues for constitutionally nonchargeable purposes *nor* pre-collection notice to all nonmembers of the basis for the reduced dues amount. The rules also would *continue* to require members to object every time that the Bar engages in nonchargeable activity that they do not wish to subsidize.

The pertinent part of the Amended Petition in *Frankel* is reproduced as Appendix B hereto.[1] It does *not* ask the Florida Supreme Court to rectify as a matter of state law the existing limits on the Bar's authority to engage in activity, as the Bar misrepresents. The *only* issue of state law that *Frankel* raises is whether eight specific legislative positions taken by the Bar fall outside the guidelines adopted in *Florida Bar Re Schwarz*, 552 F.2d 1094, 1098 (Fla. 1989), *cert. denied*, 111 S. Ct. 371 (1990), for "determining the scope of permissible lobbying activities of The Florida Bar" under state law. *Frankel* does challenge part of those guidelines, and the Bar's rule prohibiting general objections, but as a matter of *federal* constitutional law, not state law. And, "[a]bstention cannot be ordered simply to give state courts the first opportunity to vindicate [a] federal claim," particularly not a first-amendment claim. *Zwickler v. Koota*, 389 U.S. 241, 251-52 (1967).

Thus, petitioner Robert Gibson's claim for injunctive relief is not even potentially mooted by either proceeding currently pending in the Florida Supreme Court.

Moreover, this Court must "consider the procedure as it was presented to the District Court. It is clear that 'voluntary cessation of allegedly illegal conduct does not moot a case.'" *Teachers Local 1 v. Hudson*, 475 U.S. 292, 305 n.14 (1986). Even if the Florida Supreme Court were *sua sponte* to correct in the future all of the constitutional defects in the Bar's scheme, Mr. Gibson sought money damages in this action. *See infra* p. 8. "[D]amages for an illegal rebate program would necessarily have been in the form of interest on money illegally held for a period of time," *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984), as well as the portion of his dues expended for nonchargeable purposes. "That claim for damages remains in the case," which thus "is not moot," no matter how small the amount at issue. *Id.*

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[1] The remainder of that Petition, which is 19 typed pages long, consists of legal argument and a prayer for relief consistent with the Introduction and argument headings reproduced in Appendix B.

II. THE BAR IGNORES THE DIRECT CONFLICTS AMONG THE CIRCUITS ON THE QUESTIONS OF PRE-COLLECTION REDUCTION, PRE-COLLECTION NOTICE, AND SPECIFITY OF OBJECTION

Part I of the Opposition argues the merits of the constitutionality, under *Hudson*, of the Bar's procedures for accomodating members who may want to object to the collection of compulsory dues for constitutionally nonchargeable purposes. Significantly, the Bar never mentions the opinion of Circuit Judge Clark, who dissented from the decision of the court of appeals on all of the questions presented as to those procedures, *i.e.*, whether pre-collection reduction and notice are necessary, and whether multiple, specific objections can be required. *See* Petition Appendix ("App.") at 17a-21a.

Even more signficantly, the Bar deliberately ignores the decisions of other courts of appeals applying *Hudson*, all but one of which were cited in the Petition, that directly conflict with the decision in this case on one or more of those three questions: *Dean v. TWA*, 136 L.R.R.M. (BNA) 2273, 2275 (9th Cir. Jan. 22, 1991) (pre-collection notice required); *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (pre-collection reduction and notice both required); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 (1st Cir. 1990) (pre-collection notice required, specific objections cannot be required); *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987) (pre-collection reduction and notice both required); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-05 (6th Cir. 1987) (same).

Those decisions belie the Bar's boast that its "procedures fall squarely within the requirements of *Hudson* and *Keller*." Opp. at 2. They also show that the Eleventh Circuit's interpretation of the first-amendment procedural safeguards that *Hudson* and *Keller* require is diametrically opposed to that of three other courts of appeals. Review by this Court is plainly warranted for that reason alone.

III. THE BAR'S ARGUMENT CONCERNING THE PROCEDURAL SAFEGUARDS REQUIRED BY *HUDSON* AND *KELLER* REWRITES THOSE DECISIONS AND TRIES TO SHIFT THE BURDEN OF PROTECTING FIRST-AMENDMENT RIGHTS FROM THE BAR TO ITS INDIVIDUAL MEMBERS

A. Pre-Collection Reduction of the Dues Amount

The Bar argues that *Hudson* did not hold that the First Amendment requires advance reduction of the dues charged to dissenters, as well as escrow of disputed amounts, "because the union in that case had such a reduction." Opp. at 2. However, *Hudson* explicitly held that the "*appropriately justified advance reduction * * * [is] necessary* to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. It would hardly have been necessary for the Court to hold that the union must "provide *adequate justification* for the advance reduction of dues," *Hudson*, 475 U.S. at 309 (emphasis added), if no advance reduction at all were required.

Hudson was not, as the Bar urges, Opp. at 3, concerned only with misspending. Were that true, *Hudson*, 475 U.S. at 310 (emphasis added), need not have announced "constitutional requirements for the Union's *collection* of agency fees," and would have required only *post*-collection protections. But it required more. The union there had a 100% escrow, which the Court agreed "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes." *Id.* at 309. Nonetheless, the Court did not hold that the only other safeguard needed was an impartial decisionmaker to determine how much the union could lawfully spend.

Rather, *Hudson* also required *pre*-collection protections: an "appropriately justified advance reduction" to an amount that includes only clearly or arguably chargeable costs and advance disclosure of the basis for that amount. *See id.* at 306-07, 309-10. The Court found pre-collection safeguards necessary for two

reasons: first, "because the agency shop *itself*"—*i.e.*, the collection of compulsory union fees—"impinges on the nonunion employees' First Amendment interests," *id.* at 309 (emphasis added); and, second, because "the procedures required by the First Amendment also provide the protections *necessary* for any *deprivation of property*," *id.* at 304 n.13 (emphasis added).

B. Pre-Collection Notice

Hudson, 475 U.S. at 306, requires "that the potential objectors," in this case all Florida attorneys, "be given sufficient information to gauge the propriety of the [compulsory] fee." The Bar contends that it meets this requirement, because it provides members notice of its budget and "annually publishes a complete breakdown of expenditures by specific category," with percentages and dollar amounts. Opp. at 5.

However, *Hudson*, 475 U.S. at 306-07, held that to be adequate the disclosure must "identif[y] the expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." Merely furnishing a copy of a union's basic financial statement or budget does not satisfy that requirement. *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986), *aff'd on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990). The notice must explain which expenditures the organization demanding the fee considers chargeable and why: "The whole point of providing the notice [to] nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require a breakdown between chargeable and nonchargeable costs." *Hohe*, 727 F. Supp. at 167; *see Tierney*, 824 F.2d at 1504.

The Bar's budget and "breakdown" of expenses do not meet that requirement, because, like the financial statements and budgets found inadequate in *Hohe* and *Lehnert*, they do not identify expenses as chargeable or not. Appendix C hereto is the breakdown, published in the September, 1988, *Florida Bar*

Journal, which was attached to the Bar's brief in the court of appeals. It reveals only what the Bar spends in total on, *e.g.*, "Public Information," "Public Interest Programs," and "Legislation." It does *not* anywhere give "the potential dues reimbursement figure," as the Opposition at 6 disingenuously says. Nor does it tell potential objectors the portions of the categories that the Bar considers chargeable, much less "the reasons why they were required to pay their share of" those expenditures, as *Hudson*, 475 U.S. at 307, mandates.

C. The Objection Requirement

The Bar cites no authority, other than the panel majority's decision, for the proposition that it can "requir[e] an objecting member to object on an issue-by-issue basis," Opp. at 6, despite the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), directly to the contrary. The Bar also ignores one of the two reasons given by *Abood* for holding that a requirement of issue-by-issue objections is unconstitutional: "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its" chargeable activities. *Id.* Nor does the Bar deny that precisely the same burden is placed on potential objectors here.

Instead, the Bar tries to justify imposing that burden on the individual, by asserting that the general objections approved in *Abood* would somehow place on it "an unfair burden" of "either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every" legislative or political issue on which the Bar presumes that it can spend objectors' dues. Opp. at 7. That argument is disingenuous, *because the Bar has precisely that burden under its existing scheme*. That is, if a member opposes use of his dues for *any* constitutionally nonchargeable purpose (as Mr. Gibson does, *see* App. at 2a), carefully monitors the Bar's publication twice a month to determine when it engages in arguably nonchargeable activity, and objects and specifies the activity every time it does, then, under its own scheme, the Bar

must either refund for all of those activities or pay for arbitration on every issue that he has challenged.

In short, the Bar's preference for multiple, specific objections can only be for the purpose of *discouraging* dissent. That purpose is, of course, contrary to not only *Abood*, but also *Hudson*, 475 U.S. at 307 n.20 (emphasis added), which mandates that the Bar provide procedures "that *facilitate* a [member's] ability to protect his rights."

D. The Imagined Burden of Advance Reduction and Notice Is a Constitutionally Impermissible Consideration

The Bar also complains that pre-collection calculation and disclosure of the reduced dues amount would be "burdensome and impracticable." The Bar asserts that *Keller* somehow relieved it of that burden. Opp. at 3, 7. The Bar's complaint is bootless both in principle and as to *Keller*. In general, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); *see Ellis*, 466 U.S. at 444. *Keller* applied, not repudiated, that rule.

Keller agreed that "'the State Bar would not have to perform the three-step *Ellis* analysis *prior to each instance* in which it seeks to advise the Legislature or the courts of its views on a matter.'" However, it also held that the "'burden or inconvenience'" of performing that analysis once a year for all of its expenditures and giving it to all members *before* collecting their annual dues "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)) (emphasis added); *see Hudson*, 475 U.S. at 306-07. Because that analysis can be based on expenditures *during the prior year*, the Bar need not "know what political and legislative issues will arise after the collection of dues," as the Opposition at 7 imagines. *See Hudson*, 475 U.S. at 307 n.18.

IV. GIBSON'S CLAIM FOR MONETARY DAMAGES WAS NOT RAISED FOR THE FIRST TIME ON APPEAL AND IS NOT BARRED BY THE ELEVENTH AMENDMENT

The Bar concedes, as it must under *Abood*, 431 U.S. at 241-42 & n.43, that Mr. Gibson's complaint, which included a prayer for all relief to which he is entitled, was sufficient to constitute a claim for monetary damages. However, it misrepresents the record when it says that he requested refund of the portion of his dues expended for nonchargeable purposes "at the appellate level for the first time." Opp. at 8.

Gibson's motion for injunctive relief pending final hearing said that a "money judgment" in the form of a rebate of the part of his dues "used for ideological purposes" was "clearly required" in addition to injunctive relief. Dist. Ct. Record ("R.") 40 at 4-5. His response to the Bar's motion for final judgment explicitly requested that the Bar's motion be denied, because it was "necessary for the Court to receive further evidence" on issues other than the constitutionality of the Bar's rebate scheme before final judgment could be entered, "particularly damages for past improper uses of GIBSON's funds." R. 46 at 11. And, his contention that "the element of damages" remained and "require[d] an evidentiary hearing" was repeated when he renewed his motion for injunctive relief. R. 56 at 13.

In short, Gibson did not fail to raise the issue of damages in the district court on remand from the court of appeals' first decision. He raised it repeatedly and requested an evidentiary hearing on the issue, but was denied that hearing when the district court held that the Bar's scheme satisfied *Hudson*, denied his motion for injunctive relief, and dismissed the case on the erroneous ground that "no subsequent proceedings are necessary." App. at 22a-23a.

The Bar argues alternatively that it is "a 'state agency' " and, as such, immune from damages under the Eleventh Amendment.

Opp. at 8-9. While that was questionable even before *Keller*,[2] it is clearly not true now.

Keller, 110 S. Ct. at 2234, held that the California Supreme Court's ruling that the California Bar is a state agency is "not binding on us when such a determination is essential to the decision of a federal question." What is a state agency for purposes of the First or Eleventh Amendment clearly is a federal question. *Keller*, 110 S. Ct. at 2234-35, held that the California Bar is not a "government agency" for purposes of federal constitutional law, "render[ing] unavailing [the] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." The Florida Bar possesses all of the characteristics on which *Keller* relied:

- "Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members" by the Bar. *Id.* at 2234; *see* Fla. Stat. Ann., Rules Regulating Bar 1-7 (West Supp. 1990).

- "Only lawyers admitted to practice in the State of California are members of the State Bar, and all * * * lawyers admitted to practice in the State must be members." *Keller*, 110 S. Ct. at 2234-45; *see* Fla. Stat. Ann., Rules Regulating Bar 1-3 (West Supp. 1990).

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[2] *Levine v. Wisconsin Supreme Court*, 679 F. Supp. 1478, 1487-88 (W.D. Wis.), *rev'd on other grounds sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989), held that the Wisconsin Bar is not a state agency immune under the Eleventh Amendment from damages for the misuse of compulsory dues, because its funds are not deposited in state accounts and "it is largely a self-governing entity." In contrast, *Krempp v. Dobbs*, 775 F.2d 1319, 1321 & n.1 (5th Cir. 1985), held, with far less analysis, that the Texas Bar is a state agency immune from suit. *Levine*, 679 F. Supp. 1488 & n.3, distinguished *Krempp* on the ground that the Texas Bar is a state agency by virtue of state statute, unlike the Wisconsin (and Florida) Bar, which has that status under state law only by declaration of the state's supreme court. *See* Opp. at 9. Under *Keller*, even compulsory state bars which have "state agency" status by virtue of statute probably have no immunity in a suit such as this.

- The services provided "for the State by way of governance of the profession" are "essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by * * * law to the State Supreme Court." *Keller*, 110 S. Ct. at 2235; *see* Fla. Const. art. 5, § 15; Fla. Stat. Ann., Rules of Sup. Ct. Relating to Admissions to Bar (West 1983 & Supp. 1990); Fla. Stat. Ann., Rules Regulating Bar 1-10, 3-1.2, 3-3.1, 3-7.6 (West Supp. 1990).

In sum, *Keller* conclusively establishes that the Florida Bar has no eleventh-amendment immunity in this action.

CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND
RULES REGULATING THE FLORIDA BAR - BYLAWS
2-3.10 AND 2-9.3

CASE NO.

_____/

NOTICE OF BYLAW AMENDMENT

THE FLORIDA BAR upon authorization of its board of governors and pursuant to rule 2-10.1, Rules Regulating The Florida Bar, hereby notices the court of bylaw amendments and shows:

1. This notice is authorized by the Board of Governors of The Florida Bar.

2. November 30, 1990, the Board of Governors of The Florida Bar amended bylaws 2-3.10 and 2-9.3. A copy of the amended bylaws is attached as exhibit A.

3. Notice of these amendments was published in the January 1, 1990 edition of The Florida Bar News. A copy of the publication is attached as exhibit B.

4. Simultaneously with the filing of this notice, the Bar files a motion for extension of time to allow comments from members through and including February 1, 1991.

WHEREFORE, The Florida Bar prays the court will allow these bylaw amendments to become effective fifty (50) days after publication, as provided in rule 2-10.1 (f).

[signature block omitted]

EXHIBIT A

[Certification omitted]

[Italicized text was underlined in the original to show additions; text struck through is as in the original to show deletions]

2-3.10 Meetings.

The board of governors shall hold six (6) regular meetings each year, at least one of which shall be held at The Florida Bar Center. Subject to the approval of the board of governors, the places and times of such meetings shall be determined by the president, who may make such designation while president-elect. Special meetings shall be held at the direction of the executive committee or the board of governors. Any member of The Florida Bar in good standing may attend meetings at any time except during such times as the board shall be in executive session concerning disciplinary matters, personnel matters, *member objections to legislative positions of The Florida Bar,* or receiving attorney-client advice. Minutes of all meetings shall be kept by the executive director.

2-9.3 Legislative policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. *The identity of an objecting member shall be confidential unless made public by The Florida Bar or any arbitration panel constituted under these rules upon specific request or waiver of the objecting member.* Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(3) In the event the Board of Governors orders a refund, the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow for the duration of the fiscal year and until the conclusion of The Florida Bar's annual audit as provided in rule 2-6.16, which shall include final independant verification of the appropriate refund payable. The Florida Bar shall thereafter pay such refund within thirty (30) days of independent verification of the amount of refund, together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. *Venue for any arbitration proceedings conducted pursuant to this rule shall be in Leon County, Florida, however, for the convenience of the parties or witnesses or in the interest of justice, the proceedings may be transferred upon a majority vote of the arbitration panel. The chairman of the arbitration panel shall determine the time, date and place of any proceeding and shall provide notice thereof to all parties.* The arbitration panel shall thereafter confer and decide whether *The Florida Bar proved by the greater weight of evidence that* the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of

evidence. *If requested by an objecting member who is a party to such proceedings, such party and counsel, and any witnesses may participate telephonically, the expense of which shall be advanced by the requesting party.* The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, *the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow until paid. Within thirty (30) days of independent verification of the amount of refund,* The Florida Bar shall provide such refund ~~within thirty (30) days of~~ together with interest calculated at the ~~legal~~ *statutory* rate of interest *on judgments* as of the date the ~~written objection was~~ *objecting member's dues at issue were* received by The Florida Bar, *for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(5) Each arbitrator shall be compensated at an hourly rate equal to that of a circuit court judge based on services performed as an arbitrator pursuant to this rule.

(6) The arbitration panel shall tax all legal costs and charges of any arbitration proceeding conducted pursuant to this rule, to include arbitrator expenses and compensation, in favor of the prevailing party and against the nonprevailing party. When there is more than one party on one or both sides of an action, the

arbitration panel shall tax such costs and charges against nonprevailing parties as it may deem equitable and fair.

(7) Payment by The Florida Bar of the costs of any arbitration proceeding conducted pursuant to this rule shall not be considered to be an expense for legislative activities.

[Exhibit B omitted]

APPENDIX B

[Clerk's stamp omitted - filed Nov. 5, 1990]

IN THE
SUPREME COURT OF FLORIDA

THE FLORIDA BAR
Re David P. Frankel CASE NO. 76-853

INTRODUCTION TO AMENDED PETITION

PETITIONER, David P. Frankel, Esquire, is an active member in good standing of The Florida Bar. PETITIONER submits this Amended Petition because he questions the propriety of eight recommendations pertaining to a legislative position adopted by the Board of Governors (the "Board") of The Florida Bar during its meeting of October 4, 1990 and officially noticed to the Bar membership in the October 15, 1990 issue of The Florida Bar News.

PETITIONER comes before the Supreme Court of Florida, in accordance with this Court's statement in The Florida Bar re Schwarz, 552 So.2d 1094, 1097 (Fla. 1989) (hereinafter "Schwarz"), that "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court." PETITIONER, as set forth more fully below, petitions this Court for a declaration that the eight recommendations pertaining to the legislative position discussed in this Amended Petition are improper when considered against the standards adopted by this Court in Schwarz. Petitioner further petitions this Court for a declaration that the "additional criteria" adopted in Schwarz are violative of the First and Fourteenth Amendments to the United States Constitution, both by their express language and as applied. PETITIONER further petitions this Court to issue an order enjoining The Florida Bar,

[Footnotes omitted]

both pendente lite and thereafter, from engaging in any lobbying activities pertaining to the eight recommendations discussed in this Amended Petition, as well as any lobbying activities not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar. Finally, PETITIONER urges the Court to order The Florida Bar to recognize general objections made by Bar members who object to the Bar's spending any portion of their compulsory Bar dues on legislative lobbying activities or amicus brief filings.

THE FLORIDA Bar CANNOT SUSTAIN ITS BURDEN OF PROOF THAT THE LEGISLATIVE POSITIONS AT ISSUE SATISFY THE STANDARDS ADOPTED BY THE SUPREME COURT OF FLORIDA IN SCHWARZ.

* * * *

THE THREE "ADDITIONAL CRITERIA" ADOPTED IN SCHWARZ VIOLATE THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF DISSENTING Bar MEMBERS TO BE FREE FROM COMPELLED SPEECH AND ASSOCIATION

* * * *

IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES, THE FLORIDA BAR IS REQUIRED TO RECOGNIZE ITS MEMBERS' GENERAL OBJECTIONS TO THE USE OF THEIR COMPULSORY DUES TO FUND LEGISLATIVE LOBBYING ACTIVITIES AND IS FURTHER REQUIRED TO PROVIDE REFUNDS FOR SUCH GENERAL OBJECTIONS

* * * *

APPENDIX C

Financial Organization

The Florida Bar's 1988-89 operating budget is $12.8 million. Membership dues account for only 49%, or $5.9 million, of that amount.

The additional $5.9 million in revenues comes from nondues sources, generated by various Bar programs and member services such as: sale of commercial ad space in The Florida Bar *Journal* and *News*, sale of public information brochures, subscription to the *Case Summary Service*, rental of exhibit space at Bar meetings, and through Florida Supreme Court orders directing disciplined lawyers to pay prosecution costs.

A breakdown of the 1988-89 General Fund budget reflects all Bar programs costs, including support services and overhead.

Under special guidelines, the Bar's legislative program is considered to be funded entirely from member dues. The legislative budget of $320,247 divided by the July 1, 1988 members in good standing of 42,974 give a cost per member of the legislative program of $7.45.

The Florida Bar was the first state bar association to implement a cost allocation system for its various programs and activities with all costs other than General Administration, Board and Officer, and Planning and Evaluation being allocated to the end users based on the best available measure of usage. With a watchful eye toward expenditures and efficiency, Bar leadership and staff have implemented the system to monitor program expenses carefully. Prior to final adoption by the Board of Governors, the proposed Florida Bar operating budget is printed in The Florida Bar *News*. In addition, members are provided an opportunity to comment on the proposed budget at statewide hearings held by the Bar's Budget Committee.

An audit of all Florida Bar finances is conducted at the end of each fiscal year by an independent auditing firm, under the supervision of the Audit Committee, and a report is published in The Florida Bar *News* for members' review.

1988-89 General Fund Budget Statistics

	Percentage of Total Budget	Percentage of Dues Support	Amount of Dues Dollar Support
Lawyer Regulation	30.7%	50.2%	$ 70.28
UPL	1.8%	3.0%	$ 4.20
CSF	2.4%	4.0%	$ 5.60
	34.9%	57.2%	$ 80.08
Journal & News	7.8%	0.9%	$ 1.26
Public Information	4.8%	7.2%	$ 10.08
Public Interest Programs	3.6%	4.9%	$ 6.86
Meetings & Convention	4.2%	1.8%	$ 2.52
Committees & Other Activities	5.1%	6.9%	$ 9.66
Section Administration	4.0%	2.8%	$ 3.92
CLE Programs	15.5%	-0-	-0-
Legal Publications	9.2%	-0-	-0-
Legislation	2.7%	4.5%	$ 6.30
Administration	8.2%	13.8%	$ 19.32
	100.0%	100.0%	$140.00
